FILE COPY

Office - Supreme Court, U. S
FILED
MAY 12 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 34

WORCESTER COUNTY TRUST COMPANY, Executor,
Petitioner,

v.

RAY L. RILEY, Controller of the State of California, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

NORMAN W. BINGHAM, JR.,
GEORGE S. FULLER,
1 Federal Street, Boston, Massachusetts,
Attorneys for the Respondents.

W. H. H. GENTRY, ESQ.,
Sacramento, California,
of Counsel.

L. H. LANE, Law Printer, 221 High Street, Boston.

TABLE OF CONTENTS.

	Page
Opinions Below	1
Jurisdiction	1
Statement	2
Statute and Constitutional Provisions Involved	5
Argument	6
An Explanation as to the Method of Fixing the California Tax, and as to the Functions of the California Respondents in this Case	6
There is No Pressing Need of a Decision by this Court at this Time	8
The Decision of the Circuit Court of Appeals is Eminently Sound	10
The Decision of the Circuit Court of Appeals is in no Way Contrary to the Spirit or Decision of First National Bank v. Maine, 284 U. S. 312	18
The Minority Opinion is Clearly Unsound	19
In Conclusion	20
APPENDIX.	
California Political Code	23
Inheritance Tax Act of California	24
Act of 1921 as Amended 1923, 1925, 1927 and 1929	24

TABLE OF CASES CITED.

Alabama v. Wolfe, 18 Fed. 836, 838	13
Ashwander v. Tenn. Valley Authority, 297 U. S. 288	12
Ayers, In re, 123 U. S. 443, 505–6	21
Baker v. Baker, Eccles & Co., 242 U. S. 394, 404	18, 20
Burbank v. Ernst, 232 U. S. 162	18

	Page
Central Land Co. v. Laidley, 159 U. S. 103	16
Chase National Bank v. Norwalk, 291 U. S. 431, 440–1	18
City Bank v. Schrader, 291 U. S. 24	15
Colorado v. Harbeck, 232 N. Y. 71	3
Dewey v. Des Moines, 173 U. S. 193	3
Dorrance v. Martin, 298 U. S. 678	10, 17
Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204	18
Fitts v. McGhee, 172 U. S. 516	21
Goodrich v. Rochester etc. Trust Co., 160 N. Y. Supp. 293, 173 App. Div. 577	3
Haskins, Estate of, 170 Cal. 267	6
Hill v. Martin, 296 U. S. 393, 403	8
Interstate Commerce Commission v. Oregon Washington R. R., 288 U. S. 14	12
Iowa v. Slimmer, 248 U. S. 115	18
Judicial Code, sec. 265 (U. S. C. Title 28, sec. 279)	8
Lewellyn v. Frick, 268 U. S. 238, 251	12
Lion Bonding Co. v. Karatz, 262 U. S. 77, 87–90	8
Lowther v. New York Life Ins. Co., 278 Fed. 405	8
Martin's Estate, In re, 240 N. Y. Supp. 293, affd. 255 N. Y. 359	3
Milwaukee Electric Ry. & Lt. Co. v. Wisconsin, 252 U. S. 100, 106	16
Minnesota v. Northern Securities Co., 194 U. S. 48, 63	13
Missouri v. Fiske, 290 U. S. 18, 25–6	21
Missouri Pacific R. R. v. Boone, 270 U. S. 466, 471-2	12
Olmstead v. Olmstead, 216 U. S. 386	18
Overby v. Gordon, 177 U. S. 214	18
Panama R. R. v. Johnston, 264 U. S. 375, 390	12
People v. Union Trust Company, 255 Ill. 168	3
Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 487,	13
Riley, Controller, et al. v. Worcester County Trust Co., Executor (No. 215, October Term 1936)	4
Russian Fleet v. United States, 282 U. S. 481, 492	12
State of New York, No. 1, Ex parte, 256 U. S. 490	20
Sterling v. Constantin, 287 U. S. 378	15

	Page
Thormann v. Frame, 176 U. S. 350	18
Tracy v. Ginsberg, 205 U. S. 170	16
Trowbridge's Estate, 266 N. Y. 283	9
Young, Ex parte, 209 U. S. 123	15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 922.

WORCESTER COUNTY TRUST COMPANY,
EXECUTOR, PETITIONER,
v.
RAY L. RILEY, CONTROLLER OF THE STATE OF CALIFORNIA, ET AL., RESPONDENTS.

BRIEF FOR RESPONDENTS

IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OPINIONS BELOW.

The opinions of the Circuit Court of Appeals (R. 43, 57) are not yet officially reported. The opinion of the United States District Court for the District of Massachusetts (R. 26) is reported in 14 F. Supp. 754.

JURISDICTION.

The petitioner has invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT.

This is an interpleader proceeding brought by the Worcester County Trust Company, as Executor, appointed in Massachusetts, under the will of Robert H. Hunt, who died June 11, 1935, and brought under sec. 24 (26) of the Judicial Code (U. S. C. Title 28, sec. 41 (26)), as amended January 20, 1936 (49 Stat. 1096) (for convenience here called the Interpleader Act). In ancillary proceedings in California the Security-First National Bank of Los Angeles was, at the request of your petitioner, appointed administrator with the will annexed of the estate of the decedent by the Superior Court in and for the County of Los Angeles (R. 2–3).

The decedent left real estate in California, sizeable bank deposits both in California and in Massachusetts, and considerable intangible property the bulk of which is in the possession of the Executor in Massachusetts.

The respondents named in the bill are Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, and your respondents in this Court.

The bill alleges, in addition to the facts set forth above, that the respondent tax officials of each State are seeking the benefit of the petitioner's fiduciary obligations as Executor to settle all inheritance taxes; that the Tax Commissioner of Massachusetts asserts that there is a succession tax due that State under the tax statutes based on his claim of domicile in Massachusetts; and that your respondents, tax officials of California, assert there is an inheritance tax due that State under its tax statutes based on their claim of domicile in California, and that the threatened collection of both taxes, each based upon an inconsistent claim of domi-

cile, will violate the Fourteenth Amendment of the Federal Constitution.

The bill prays, in substance, not only that the court determine the domicile of the decedent, but that the court determine the amount of the inheritance taxes and discharge the petitioner from further liability.

On the face of it there is an inheritance tax obligation to the State of California because there is real estate there. Such tax is to be paid to the county treasurer who collects it for the state.[1] (He was not made a party to this bill.) Such tax is payable by the legal representative of the estate in California, in this case the Security-First National Bank of Los Angeles, the administrator with the will annexed appointed by the California court. The Massachusetts executor is under no obligation to pay the California tax, and there is no effective lien for the California tax on the property in the possession of the executor. *Dewey* v. *Des Moines,* 173 U. S. 193; *In Re Martin's Estate,* 240 N. Y. Supp. 293, affd. 255 N. Y. 359; *Goodrich* v. *Rochester etc. Trust Co.,* 160 N. Y. Supp. 293, 173 App. Div. 577; *People* v. *Union Trust Company,* 255 Ill. 168; *Colorado* v. *Harbeck,* 232 N. Y. 71. Whether there is also an inheritance tax obligation to Massachusetts depends upon whether or not the decedent was domiciled there at the time of his death. So far as California is concerned, any question as to the domicile of the decedent can affect only the amount of the tax obligation and not the existence of the obligation.

The District Court entered an ex parte order temporarily restraining the tax officials of each state from

---

[1] The pertinent provisions of the Inheritance Tax Act of California (Act of 1921 as amended 1923, 1925, 1927 and 1929) are set out in the Appendix to this Brief. See sec. 19 of that Act.

taking steps to assess, determine or collect inheritance taxes due from the Hunt Estate.

Your respondents, appearing specially only for the purpose of objecting to the jurisdiction of the Court over them, moved to dismiss the bill and to dissolve the restraining order. The Massachusetts Tax Commissioner appeared generally and filed an answer to the merits.

Your respondents' motions were thereafter denied (R. 23, 34), and the District Court entered an order (R. 24) temporarily enjoining each of the respondents to the bill "from taking any action to fix or assess" any estate or inheritance tax "and from taking any action to collect any" such tax from the petitioner, or from the Security-First National Bank of Los Angeles as administrator with the will annexed.

As soon as your respondents' appeal[1] was docketed in the Circuit Court of Appeals, they petitioned this Court for a writ of certiorari. This petition was denied on October 12, 1936. (*Riley, Controller, et al.* v. *Worcester County Trust Co., Executor* (No. 215, October Term 1936)). The case was thereafter argued before the Circuit Court of Appeals, and on March 15, 1937 that Court (Morton, J., dissenting) reversed the District Court (see opinion at R. 43) and entered a final decree by which it vacated the order of the District Court granting a temporary injunction and remanded the case to that court with direction to dismiss the bill for want of jurisdiction (R. 59).

[1] The Massachusetts Tax Commissioner declined to join in the appeal

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statute involved is Par. 26 of Section 24 of the Judicial Code as amended by the Act of January 20, 1936 (49 Stat. 1096), and is set out in full at pages 7–9 of the Record. The petitioner has excerpted and set forth at pages 5–6 of the Petition most of the material parts, but there omitted one of the most important provisions, to wit:

> "(d) Said court shall hear and determine the cause and shall discharge the complainant from further liability; . . ."

Article III of the Constitution provides in part:

> "Section 2, Clause 1. The judicial Power shall extend . . . to controversies between two or more States;—between a State and Citizens of another State; . . ."
>
> Section 2, Clause 2.
>
> "In all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction. . . ."

The Eleventh Amendment is as follows:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

ARGUMENT.

AN EXPLANATION AS TO THE METHOD OF FIXING THE CALIFORNIA TAX, AND AS TO THE FUNCTIONS OF THE CALIFORNIA RESPONDENTS IN THIS CASE.

A brief outline of the method of fixing the California tax and as to the functions of the California respondents is important for a proper interpretation of the allegations of the bill, and for a proper consideration of this case. Copies of the pertinent California statutes are set forth in the Appendix to this Brief.

At the time of the probate of will, the court having jurisdiction over the probate and the estate appoints an Inheritance Tax Appraiser[1] for that estate. He has the powers of a referee and is merely an officer or appointee of the court to examine into the facts and make his determination as to the amount of the tax and the facts bearing thereon, and report the same to the court (Sec. 16 (1)). He is an essential part of the court in every such tax proceeding. See *Estate of Haskins,* 170 Cal. 267, for a full explanation as to the position and function of the Inheritance Tax Appraiser.

Upon the filing of the report the court gives notice to the State Controller and all other parties interested and they have an opportunity to file objections. If objections are filed, the matter is set down for hearing before the court, at which hearing the report is treated merely as prima facie correct. (Sec. 16 (2).) After hearing the court makes its order fixing the tax and this order has the force and effect of a judgment in a civil action, with

---

[1] Each county has one or more Inheritance Tax Appraisers who are appointed as such by the State Controller, just as Masters in Chancery are appointed by the Governor in Massachusetts, their duties being to act in a particular case when appointed by the court in such case. (Sec. 14.)

all rights of appeal, etc. (Sec. 18.) It is then the duty of the County Treasurer to collect the tax and pay the same to the State Treasurer. (Sec. 19.)

It thus appears that the entire matter of determining the tax liability of an estate is a court proceeding which begins (and began in the case at bar) with the appointment by the court of the Inheritance Tax Appraiser (the respondent Sproul in the present case). Until the court makes its order, after the report is filed and the hearing on it had, there can be no determination, in the sense of a legal determination, as to the decedent's domicile or as to the tax liability of the estate. Such a determination can come only by the court in a judicial proceeding which, in the case of the present estate, is and was at the time the interpleader bill was filed actually pending in the California court.

The Controller maintains under his authority and direction an inheritance tax department. (Political Code, Sec. 445.) In a case, like the present one, where there are probate proceedings in California, the Controller first comes into the tax proceeding when he is given notice by the court of the filing of the Inheritance Tax Appraiser's report. The inheritance tax attorney is merely the official attorney for the Controller, in charge of the legal work.

In the light of such a situation the allegation that the California respondents have each determined that Hunt died domiciled in California merely amounts to an assertion that such is the conclusion each has come to in his own mind, and not that there has been any legal or official determination of the tax liability of the estate to the State of California.

In view of the situation in California it further becomes apparent that the injunction against the In-

heritance Tax Appraiser is clearly not within the scope of any District Court's jurisdiction. An officer of a state court may not be enjoined by a federal court from performing his duties. Judicial Code, sec. 265 (U. S. C. Title 28, sec. 279); *Hill* v. *Martin,* 296 U. S. 393, 403; *Lion Bonding Co.* v. *Karatz* (the *Hertz* case) 262 U. S. 77, 87–90. The Interpleader Act creates no exception as to procedings by state courts or by their officers. It provides only that "claimants" may be enjoined from "instituting or prosecuting" proceedings. This injunction provision is not materially different now from what it was when it first appeared in the 1926 Amendment (44 Stat. 416) of that Act, 10 years before the present (1936) amendment, see *Lowther* v. *New York Life Ins. Co.,* 278 Fed. 405 (3rd C. C. A.).

THERE IS NO PRESSING NEED OF A DECISION BY THIS COURT AT THIS TIME.

The need of decision by this Court is by no means as pressing as it was when the previous petition for certiorari was filed in this cause by your present respondents before the decision of the Circuit Court of Appeals. With that decision* as the only precedent there was danger that it might be followed by other District Courts in similar cases with the result that the several States would be likely to be seriously hampered in the orderly administration of their tax laws and the prompt collection of their revenues. And in fact that is just what has happened.

If certiorari is granted, the probable result will be that District Courts will continue in force or issue restraining orders or injunctions, as the District Court did in the case at bar, enjoining the tax officials of the several States involved "from taking any action to fix

* of District Court.

or assess'' any inheritance or estate tax, and from taking any action to collect such tax. In California such an injunction, coming as it does before the Inheritance Tax Appraiser makes his report, prevents even any legal or official determination being made as to the decedent's domicile. He is halted in the performance of his functions as an officer of the court. And this is done ex parte on the allegations of the Executor or someone on behalf of the Executor. The tax officials cannot contest such allegations without appearing generally and submitting to the jurisdiction of the court.

Furthermore, *non constat,* that the State court, after hearing all the parties in interest, would determine that the decedent was domiciled in the State.[1] The estate will have a full opportunity to present the evidence and be heard by the court as to the fact of domicile. It is not to be assumed that the court will decide against the evidence, but rather that its finding will be warranted by the evidence. See *Trowbridge's Estate,* 266 N. Y. 283. A State should not be subjected to having the administration of its revenue law interfered with merely because an executor happens to have a fear that the court of that State, charged with the duty of determining, after hearing the parties, the fact as to the decedent's domicile, may reach a determination of fact which would not be warranted by the evidence. And surely if the finding were warranted by the evidence the executor could have no grounds to complain.

If certiorari is denied, it is much more likely, we submit, that the decision of the Circuit Court of Appeals in the case at bar will be looked to as the sound precedent

---

[1] In the case at bar, however, the California respondents have every confidence that the evidence will warrant a finding that the decedent was domiciled in California and that the court would so find.

by the several District Courts where similar interpleader suits are now pending or may be brought, and the present intolerable situation of the several States will probably be immediately relieved. They will undoubtedly recognize as pointed out in the Petition (P. 10), that at the time of the decision of the District Court the case had not received the thorough attention which has now been disposed upon it. We submit that, contrary to the suggestion of the petitioner, it is most unlikely that a conflicting decision would be made by any other Circuit Court of Appeals. The five judges referred to by the petitioner as having taken widely divergent views, obviously are the following: Judge Sweeney, who issued the temporary restraining order ex parte on the filing of the bill (R. 12). Judge Brewster, whose opinion appears at R. 26. While the case was argued and briefed before him, nevertheless several of the more important reasons why the court did not have jurisdiction were not then advanced, and also this Court's denial of certiorari in the *Dorrance* case (298 U. S. 678) did not occur until after his decision. The other three were the Judges of the Circuit Court of Appeals, and the dissenting opinion is dealt with later in this brief.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS EMINENTLY SOUND.

The conclusion of the Circuit Court of Appeals that the District Court had no jurisdiction over the California respondents, and its line of reasoning in reaching that conclusion is so obviously sound that it is difficult to conceive that it will not be followed by the district courts in similar cases that may be pending or be brought in other Circuits. It is equally unlikely that

any other Circuit Court of Appeals will reach a conflicting conclusion.

The executor grounds its claim of jurisdiction over the California respondents solely on the Interpleader Act. Neither from the language of that Act nor from a study of its history can the slightest intimation be gathered that Congress ever intended or contemplated that the Act should be construed to authorize the impleading of the claimants to inheritance tax obligations.[1]

Such obligations are obligations to the State, and the real claimants thereto must of necessity be the States themselves or their representatives or agents. The purpose of interpleader is to enable an obligor to bring into one court the parties claiming to be entitled to the obligation and there hear and determine the cause and *discharge* the complainant from further liability. In order to have interpleader apply to such tax obligations it is obvious that the court must have or be given jurisdiction over the real parties in interest, *i. e.* the parties entitled to such tax obligations, which are the States themselves.

It is clear, therefore, that Congress could not have made the Interpleader Act apply to such tax obligations, even had it so wished. An interpleader suit is a suit against the parties claiming to be entitled to the obligation, and the Eleventh Amendment expressly prohibits the courts of the United States from entertaining a suit against a State by a citizen of another State.

Furthermore, to construe the Interpleader Act as authorizing the district courts to entertain such interpleader suits would violate a well-established principle

---

[1] See 74th Cong. 1st Sess. Senate Report No. 558 to accompany S. 1277. See also House Report No. 1437 as to the same bill.

which this Court has many, many times reiterated and followed,—the principle that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score. *Missouri Pacific R. R.* v. *Boone,* 270 U. S. 466, 471–2; *Ashwander* v. *Tenn. Valley Authority,* 297 U. S. 288; *Lewellyn* v. *Frick,* 268 U. S. 238, 251; *Interstate Commerce Commission* v. *Oregon Washington R. R.,* 288 U. S. 14; *Panama R. R.* v. *Johnston,* 264 U. S. 375, 390. Particularly is this so when the Act, if read according to its terms, presents no difficulty. *Russian Fleet* v. *United States,* 282 U. S. 481, 492.

At the National Conference of the National Tax Association in 1935 the Committee of that Association appointed at the conference in 1934 to study and report on the problem of double domicile in death taxation, made its report in which, in discussing the various suggested solutions, pointed out that there would be grave doubt as to the power of Congress to give to the District Courts jurisdiction over such disputed domicile cases. It said:

> "It has been suggested that Congress be induced to pass legislation specifically enlarging the jurisdiction of Federal District Courts to include such cases of disputed domicile in tax matters. There is grave doubt whether the Federal Constitution confers upon the Federal Government the power to pass legislation under which two or more states may be joined in a proceeding in a Federal court for the purpose of determining the domicile of a decedent. **Each State involved would say that when it subscribed to the Federal Constitution it did not surrender to the Federal Government its power to say whether a decedent was domiciled within its borders;**

> that this is purely a matter for state determination except that, if a state commits a wrong for which redress may be had under the Federal Constitution, the remedy is by action of the executor against the offending state by certiorari from the highest state court to the United States Supreme Court."

Furthermore, that Committee rejected a suggestion that the States agree, either by legislation or otherwise, that if the executor should be able to take the matter into a Federal Court, the States would be bound by the decision arrived at. As the Committee put it, it "opens up possibilities that might not be desirable." It also referred to the "recurring difficulty as to whether all of the States could be made parties, and if they were not parties, they might not feel that they ought to be bound by the litigation."

When read according to its terms the Interpleader Act presents no difficulty. It expressly provides not only that the adverse claimants must be citizens of different states, which eliminates cases where states are the claimants, for a state is not such a citizen, *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 63; *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 487; *Alabama* v. *Wolfe*, 18 Fed. 836, 838, but it further requires that the adverse claimants be those who are "claiming to be entitled" to the obligation.

As we have already shown, none of the California respondents in the case at bar are even alleged to be "claiming to be entitled" to the obligation. The Inheritance Tax Appraiser is a referee appointed by the California court to make a finding and report such a finding to the court and he has been enjoined from proceeding with his investigations and from making his

report. The Controller is the representative of the State who is charged with the duty of representing and acting for the State in the proceeding before the California court and comes into that proceeding only *after* notice which is yet to be issued by the Court *after* the Inheritance Tax Appraiser's report is filed. The Inheritance Tax Attorney is the person who acts as attorney for the Controller in such court proceeding.

The allegation that these California respondents "have determined" that the decedent was domiciled in California is certainly not an allegation that they are "claiming to be entitled" to the tax obligation. The allegation that they "are asserting and have threatened and are about to assess and attempt to collect" the California inheritance tax also is obviously not an allegation that they are "claiming to be entitled" to such obligation. Such an allegation, read as it must be in the light of the California statutes and law, amounts to nothing more than an assertion that they are acting and threatening to act in the performance of their respective duties in the tax proceeding which is pending before the California court wherein eventually that court is to enter its judgment fixing and determining the amount of the tax, which judgment it will then be the duty of the County Treasurer (*not* a party respondent in this case) to collect and pay into the State Treasury. None of the California respondents are "claiming to be entitled" to the tax, nor is it conceivable that they ever would be. They are merely claiming that the *State of California* is entitled to the tax.

The fundamental fallacy in the executor's line of reasoning is that, notwithstanding it states that its bill is brought under the provisions of the Interpleader Act, it promptly either forgets, or deliberately shuts its eyes

to, the requirement that the court must have before it the real parties in interest, *i. e.* the parties who are "claiming to be entitled" to the obligation which is the subject matter of the bill. It also forgets that it is absolutely necessary that the real parties in interest entitled to the obligation be the party claimants; otherwise the court could not determine the cause so as to bind the parties entitled to the obligation, and therefore could not discharge the executor from its liability for that obligation.

In its endeavor to satisfy the requirements of the Act that the adverse claimants be citizens of different states, *i. e.* individuals, and not the states themselves, the executor invokes the principle laid down in a line of cases in this Court such as *Ex parte Young,* 209 U. S. 123; *City Bank* v. *Schrader,* 291 U. S. 24; and *Sterling* v. *Constantin,* 287 U. S. 378, to the effect that a state official who attempts to enforce the collection of an unconstitutional tax may be enjoined by a Federal court from so doing. The theory on which such a principle is based is that such a state official is considered as "stripped of his official or representative character". *Ex Parte Young,* 209 U. S. 123, 160.

Under such a theory, however, these alleged claimants cannot be "claiming to be entitled" to the tax obligation. Nor in fact do they so claim. They claim that the State is entitled to it. Having stripped them of their representative character in order to qualify them as "citizens" the *executor cannot in the same breath make out that they are the real parties in interest to the controversy as to domicile, for they would not be the representatives of the State, the party entitled to the obligation.*

What the executor is really attempting by this suit is

to read into the Interpleader Act sufficient new words and read out of it sufficient of its present words so that what would be left would be an act purporting to give to each District Court a nation-wide jurisdiction to enjoin tax officials from levying or threatening to levy unconstitutional inheritance taxes. Such an act, however, would not be an interpleader act. It would be an act to extend the jurisdiction of the district courts in another branch of equity jurisprudence,—suits to enjoin threatened wrongs.

But the allegations of its bill are not even sufficient to bring it within such a rewritten act. The bill does not allege that the decedent was not domiciled in California, nor that a tax based upon a determination of a California domicile would be unconstitutional. It makes no allegation that the determination by the California respondents that the decedent was domiciled in California was made arbitrarily and without substantial evidence to support it. The bill therefore does not even allege any facts sufficient, if true, to show a violation of the Fourteenth Amendment by the California respondents.

The allegations that they have determined that the decedent was domiciled in California and intend to proceed accordingly, and that the Massachusetts tax commissioner has determined that the decedent was domiciled in Massachusetts and intends to proceed accordingly do not warrant the conclusion that one or the other of them must be threatening a violation of the Fourteenth Amendment. The Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error. *Milwaukee Electric Ry. & Lt. Co.* v. *Wisconsin,* 252 U. S. 100, 106; *Central Land Co.* v. *Laidley,* 159 U. S. 103; *Tracy* v. *Ginzberg,* 205 U. S. 170.

This defect in the bill, even under the executor's theory as to the scope of the Interpleader Act, was convincingly pointed out by the Circuit Court of Appeals (R. 52–3). Whether or not that court was correct in its conclusion as to the reasons why this Court denied certiorari in *Dorrance* v. *Martin,* 298 U.S. 678, is immaterial, and would not furnish any reason for granting certiorari in the case at bar. That conclusion was not the *sine qua non* of the Circuit Court of Appeal's decision that the executor's bill did not allege a violation of the Fourteenth Amendment.

Another reason why the Interpleader Act cannot be construed to apply in the present situation, where the controversy sought to be settled is as to which of two or more States is entitled to impose an inheritance tax upon the intangible property of a decedent's estate, is that such a controversy is of necessity a controversy between the States themselves, and hinges upon a determination of the fact of domicile. This Court is the only court which has jurisdiction in cases of controversies between States. That being so, it must follow that the District Court could not have jurisdiction of such a controversy. In granting leave recently to the State of Texas to file its amended bill of complaint against the State of Florida et al. to have this Court settle such a controversy as to the domicile of the late Colonel Green for the purpose of settling the question as to which of the four States involved had the right to impose such a tax upon the intangible personal property, the Court must have done so on the principle that such a controversy was a controversy between the States themselves.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN NO WAY CONTRARY TO THE SPIRIT OR DECISION OF FIRST NATIONAL BANK v. MAINE, 284 U. S. 312.

The only question in that case and in *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204 was whether a State could impose an inheritance tax on intangibles of a decedent who admittedly was domiciled in *another* State. This Court was there concerned with a question of multiple taxation "following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contribution." (*Minnesota* case at p. 212.) In the present case neither State is threatening to misapply any legal fiction or conflicting theory. Each State is proceeding on the same theory, *i. e.,* that intangibles are taxable at the domicile. The only conflict alleged is a conflict as to a question of fact,—the jurisdictional fact—the place of the domicile. This Court has many times recognized that each State may examine into and determine for itself the fact of domicile, where that fact is a jurisdictional fact. *Iowa* v. *Slimmer,* 248 U. S. 115; *Olmstead* v. *Olmstead,* 216 U. S. 386; *Chase National Bank* v. *Norwalk,* 291 U. S. 431, 440–1; *Thormann* v. *Frame,* 176 U. S. 350; *Overby* v. *Gordon,* 177 U. S. 214; *Burbank* v. *Ernst,* 232 U. S. 162; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394.

THE MINORITY OPINION IS CLEARLY UNSOUND.

The minority opinion of Judge Morton in the Circuit Court of Appeals proceeds not only on an erroneous interpretation of the allegations of the bill, but also on complete misconception of the terms and purpose of the Interpleader Act.

He says (R. 57) that the bill alleges in substance "that the claim made by each State official is wholly unwarranted in law, is without legal justification under any statute, and violates the XIV Amendment". All that the bill does allege is that "the threatened collection of both the California and Massachusetts taxes, each based on an inconsistent claim of domicile, will deprive your complainant of property without due process of law" etc. Such an allegation is far from an allegation that *each* claim is unwarranted in law. It is rather an allegation merely that one or the other claim is unwarranted in law.

Judge Morton then says (R. 58) that "the plaintiff's allegation that he is acting unconstitutionally and in violation of law, is bound to fail, and as to that one the suit will then be dismissed". Any proceeding in which such a result followed would certainly not be any known kind of an interpleader proceeding or a proceeding such as is provided for by the Interpleader Act, for the party bringing the bill could not be discharged from further liability with respect to his obligation. It is not interpleader to merely determine which of two parties has a claim, and then *dismiss the proceeding as to the party found to have the claim!* Such a proceeding is unknown in the law so far as we know. The nearest analogy is a proceeding under a declaratory judgment statute.

Judge Morton further states that the Interpleader

Act "is designed to" cover the situation where there are conflicting claims between states as to the domicile of a decedent. Such a statement, if intended to mean that Congress intended that Act to apply in such a case, is entirely without foundation. There is not a scintilla of evidence in the history of the Act indicating that Congress ever had any kind of a tax situation in mind.

In suggesting that "doubt should be resolved in favor of jurisdiction under this statute", Judge Morton disregards the rule (see p. 12, *supra*) that statutes should be construed so as to avoid doubt as to their constitutionality. No suggestion of expediency, or argument *ab inconvenienti,* should be sufficient to warrant a holding that the conflicting inheritance tax claims of two states can be impleaded in a District Court, especially in the face of Art. III, Sec. 2, clause 2, and the Eleventh Amendment. See *Baker* v. *Baker Eccles & Co.,* 242 U. S. 394, 404.

IN CONCLUSION.

It is respectfully submitted that this case is one in which the want of authority in the District Court to entertain the bill is so clear, and the fact that the proceeding is in essence a suit against the State of California without its consent is so evident, that not only that State but all the other States who are now being, or are likely to be, prevented by injunctions from proceeding in the orderly administration of their revenue laws should not be subjected to any further continuance of such delays. See *Ex parte State of New York, No. 1,* 256 U. S. 490.

"Considerations of convenience open no avenue of escape from" the explicit limitations of the Eleventh Amendment on the judicial power of the Federal courts.

Missouri v. *Fiske,* 290 U. S. 18, 25–6. This limitation cannot be avoided by bringing the suit against the officers or agents of the State in cases where the State is "the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." See *In re Ayers,* 123 U. S. 443, 505–6, and *Fitts* v. *McGhee,* 172 U. S., 516, both cited with approval in *Missouri* v. *Fiske,* 290 U. S. 18, 27.

Wherefore your Respondents submit that the petition for a writ of certiorari be denied.

Respectfully submitted,

NORMAN W. BINGHAM, JR.,
GEORGE S. FULLER,
1 Federal Street, Boston, Massachusetts,
Attorneys for the Respondents.

W. H. H. GENTRY, Esq.,
Sacramento, California,
of Counsel.

APPENDIX.

CALIFORNIA POLITICAL CODE.

"*Section 445. Inheritance tax department.* The controller shall maintain under his authority and direction a department, to be known as the inheritance tax department, which is hereby established, for the purpose of supervising and assisting in the administration of the inheritance or transfer tax laws of this state.

"*Duties.* Said department shall gather, record, compile, publish and distribute such information and data as the controller may direct relative to the inheritance or transfer tax laws of this or other states or relative to the administration, enforcement or evasion of such laws. Said department shall cooperate with, advise and assist inheritance tax appraisers, county treasurers, district attorneys, and other officers and persons in the administration and enforcement of the inheritance or transfer tax laws of this state, and shall prepare, publish and distribute such blank forms for the use of inheritance tax appraisers or other use as the controller may direct.

"*Attorneys.* In connection with said inheritance tax department, the controller may appoint, in addition to other employees provided for by statute, an inheritance tax attorney whose office shall be in the City of Sacramento, five assistant tax attorneys, two of whom shall have their offices in the City of Los Angeles, two of whom shall have their offices in the City and County of San Francisco, and one of whom shall have his office in the City of Sacramento. Said attorneys shall be civil executive officers and shall be admitted and licensed to practice before the supreme court of this state. The in-

heritance tax attorney shall, under the authority and direction of the controller, have general supervision of said department. He shall have particular charge of the legal work connected with said department and shall perform such other duties as the controller may direct.

"*Services.* Said assistant inheritance tax attorneys shall perform such legal and other services relative to the administration and enforcement of said inheritance or transfer tax laws in the respective counties in which their offices may be situated or in any neighboring county, as the controller may direct."

"*Salaries. . . .*" (Omitted because not material.)

"*Expenses. . . .*" (Omitted because not material.)

INHERITANCE TAX ACT OF CALIFORNIA.

ACT OF 1921 AS AMENDED 1923, 1925, 1927 AND 1929.

"SEC. 14. The state controller shall appoint, and may at his pleasure remove, one or more persons in each county of the state to act as inheritance tax appraisers therein. Every such inheritance tax appraiser (in addition to any fees paid him as appraiser under section one thousand four hundred forty-four of the Code of Civil Procedure) shall be paid for his services out of the inheritance tax moneys in the hands of the treasurer of the county, in which he may be acting, a reasonable compensation, to be fixed by the superior court of said county, or a judge thereof, and, together with said compensation, said appraiser shall be allowed his actual and necessary traveling and other incidental expenses, and the fees paid such witnesses as he shall subpoena before him, said expenses and fees to be allowed by said superior court or a judge thereof; *provided,* that any claim for any such services or expenditure, must before payment, first receive the approval of the state con-

troller; *and provided, further,* that in any probate proceeding in which the executor or administrator shall have failed to have had the inheritance tax appraiser act as one of the appraisers under section one thousand four hundred forty-four of the Code of Civil Procedure and to have paid him his fees therefor, the expense of making the inheritance tax appraisement in this act provided for shall be paid out of said estate, and the executor or administrator thereof shall be liable for said fee. Any such appraiser who shall take any fee or reward, other than such as may be allowed him by law, from any executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay said tax, or any portion thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred fifty dollars nor more than five hundred dollars, or be imprisoned in the county jail ninety days or both, and, in addition thereto the court shall dismiss him from such service.

"SEC. 15. The superior court in the county in which is situate the real property of a decedent, who was not a resident of the state, or if there be no real property, then in the county in which any of the personal property of such nonresident is situate, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act; the court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other; *provided,* that the superior court having acquired jurisdiction in probate of the estate of a decedent shall hear and determine in said probate proceedings all questions in relation to any tax arising under the provisions of this act: (*a*) Upon property passing

in said probate proceedings. (*b*) Upon any other property transferred, within the meaning of subdivision three of section two or any other provisions of this act, to any person, institution or corporation taking any property under and by virtue of said probate proceedings.

"SEC. 16. (1) When any superior court, having jurisdiction in probate of the estate of any decedent, or a judge of such court, shall, in accordance with section 1444 of the Code of Civil Procedure, appoint the appraiser or appraisers in said section provided for, said superior court or judge thereof shall also at the same time designate and appoint an inheritance tax appraiser (unless such designation and appointment be previously made) to ascertain and report to said superior court the amount of inheritance tax due upon any property passing in said probate proceeding, or a lien thereon, or upon any other property transferred within the meaning of subdivision (3) of section 2 of this act, or under any other provision of this act, to any person, institution or corporation taking property under and by virtue of said probate proceedings, together with such other or additional information as shall assist said court in the determination of said tax. Thereupon said inheritance tax appraiser shall have all the powers of a referee of said superior court, and shall have jurisdiction to require the attendance before him of the executor or administrator of said estate or any person interested therein, or any other person whom he may have reason to believe possesses knowledge of the estate of said decedent, or knowledge of any property, transferred by said decedent within the meaning of this act, or knowledge of any facts that will aid said appraiser or the court in the determination of said tax. For the

purpose of compelling the attendance of such person or persons before him, and for the purpose of appraising any property or interest subject to, or liable for any inheritance tax hereunder, and for the purpose of determining the amount of tax due thereon, the said inheritance tax appraiser is hereby authorized to issue subpoenas compelling the attendance of witnesses before him. Any person or persons who shall be served with a subpoena, issued by said inheritance tax appraiser, to appear and testify or to produce books and papers, and who shall refuse and neglect to appear and testify or to produce books and papers relevant to such appraisement, as commanded in such subpoena, shall be guilty of a contempt of court. And he may examine and take the evidence of such witnesses or if such executor or administrator, or other person under oath concerning such property and the value thereof and concerning the property or the estate of such decedent subject to probate, and concerning any transfer made by such decedent within the meaning of this act. Upon the completion of his inheritance tax appraisement in any probate proceeding, the inheritance tax appraiser shall make a report in writing to the superior court of the clear market value of the several interests in the estate of the decedent, and shall report the amount of inheritance, or transfer tax chargeable against, or a lien upon such interests, acquired by virtue of said probate proceedings or by any transfer within the meaning of this act, to any person, institution or corporation acquiring any property by virtue of said probate proceedings together with such other facts as may advise the court in regard thereto, or which the court may require, and may return to said superior court such depositions as he may have had reduced to writing, exhibits, or

other testimony or information taken before him, or submitted to him.

"(2) Upon the filing of said report said appraiser shall mail a copy thereof to the state controller and the clerk of said superior court shall on said day or the next succeeding judicial day give notice of such filing to all persons interested in such proceedings by causing **notice to be posted at the court house in the county where the court is held,** and in addition thereto shall mail to the state controller and to all persons chargeable with any tax in said report who have appeared in such proceeding, a copy of said notice. At any time after the expiration of ten days thereafter, if no objection to said report be filed, the said superior court or a judge thereof, may, without further notice, give and make its order confirming said report and fixing the tax in accordance therewith. At any time prior to the making of said order, any person interested in said proceeding (including the state controller) may file obpections in writing to said report. Thereupon **the clerk of the** said superior court shall fix a time, not less than ten days thereafter, for the hearing thereof, and shall **give notice of said hearing by posting a notice thereof at the court house in the county where the court is held and by forthwith mailing a copy of such objection and of such notice to the state controller, county treasurer and inheritance tax appraiser.** Upon the hearing of said objections, said court, may make such order as to it may seem meet and proper in the premises; **provided, that for the purpose of said hearing the report of the inheritance tax appraiser shall be presumed to be correct and it shall be the duty of objector or objectors to proceed in support of said objection or objections.**

"(3) If, upon examination of the executor or administrator of said estate or other persons familiar with the

affairs of such decedent, or from other information before him, it shall appear to the inheritance tax appraiser that there is no inheritance tax due out of said estate or a lien upon any property or interest therein, said appraiser may so certify to the superior court, and at any time thereafter, if no objection to said certificate shall have been filed, said superior court or a judge thereof may, without further notice, make an order or decree that there are no inheritance taxes due out of said estate or upon any interest therein or may make such different order as may to it seem meet in the premises. Such order shall be conclusive only as to such property as may have been returned in the inventory or inventory and appraisement in said probate proceedings.

"SEC. 17. (1) If it shall appear to the superior court upon petition of the state controller that any transfer has been made within the meaning of this act and the taxability thereof, and the liability for such tax and the amount thereof have not been determined, and that no proceedings are pending in any court in this state wherein the taxability of such transfer and the liability therefor, and the amount thereof may be determined, said court shall issue a citation ordering and directing the persons who may appear liable therefor or known to own any interest in or part of the property transferred, to appear before said court or before an inheritance tax appraiser to be designated by said order at a time and place in said order named, not less than ten days nor more than one year from the date of such order, to be examined, under oath by said court or by said appraiser as the case may be concerning said transfer and all facts connected therewith, and concerning the property transferred and the character and value thereof."

"SEC. 18. The orders, decrees and judgments fixing

tax or determining that no tax is due, mentioned in this act, shall have the force and effect of judgments in civil actions. Except as otherwise herein provided, the provisions of the Code of Civil Procedure relative to judgments, new trials, appeals, attachments and execution of judgments, so far as applicable, shall govern all proceedings taken under this act. Nothing in this section shall preclude the state from relief herein provided for, which may be inconsistent with the provisions of the Code of Civil Procedure.

"SEC. 19. The treasurer of each county shall collect all taxes and moneys that may be due and payable under this act and pay the same to the state treasurer (excepting such moneys as he may pay out from time to time pursuant to the provisions of this act) and the state treasurer shall give him a receipt therefor;"

"SEC. 22. All taxes levied and collected under this act, up to the amount of two hundred fifty thousand dollars annually, shall be paid into the treasury of the state, for the uses of the state school fund, and all taxes levied and collected in excess of two hundred fifty thousand dollars annually shall be paid into the state treasury to the credit of the general fund thereof."